

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICKY HORTON,

Plaintiff,

v.

Case Number 04-10060
Honorable David M. Lawson
Magistrate Judge Charles E. Binder

ANDREW JACKSON,

Defendant.

**ORDER GRANTING PLAINTIFF-APPELLANT'S MOTION TO
PROCEED IN FORMA PAUPERIS ON APPEAL AND DENYING PLAINTIFF-
APPELLANT'S MOTION FOR A CERTIFICATE OF APPEALABILITY**

This matter is before the Court on the plaintiff's application to proceed *in forma pauperis* on his appeal from the Court's entry of judgment dismissing the case on March 16, 2010. The plaintiff has also filed a motion for a certificate of appealability. However, the Court already denied a certificate of appealability in this case on March 20, 2010 and it appears that the plaintiff's motion is addressed to the Sixth Circuit on appeal. Therefore, the Court will decline to revisit this issue.

An appeal may be taken *in forma pauperis* if the appeal is taken in "good faith." 28 U.S.C. § 1915(a). "Good faith" requires a showing that the issues are arguable on the merits and are, therefore, not frivolous; it does not require a showing of probable success. *Harkins v. Roberts*, 935 F. Supp. 871, 873 (S.D. Miss. 1996) (quoting *Howard v. King*, 707 F.2d 215, 219-20 (5th Cir. 1983)). "If the district court can discern the existence of any nonfrivolous issue on appeal, the movant's petition to appeal *in forma pauperis* must be granted." *Harkins*, 935 F. Supp. at 873. Explaining that "not all unsuccessful claims are frivolous," the Sixth Circuit has held that a complaint is frivolous if a plaintiff "cannot make any claim with a rational or arguable basis in law or in fact." *Wilson v. Yaklich*, 148 F.3d 596, 600 (6th Cir. 1998) (quoting *Neitzke v. Williams*, 490

U.S. 319, 329 (1989), and *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990)). The issues in this case are not frivolous because the plaintiff-appellant's claim has a rational or arguable basis in law and in fact. Therefore the appeal is taken in good faith.

Accordingly, it is **ORDERED** that the plaintiff-appellant's motion to proceed *in forma pauperis* on appeal [dkt # 41] is **GRANTED**.

It is further **ORDERED** that the plaintiff-appellant's motion for a certificate of appealability [dkt. # 40] is **DENIED**.

It is further **ORDERED** that the custodian of the plaintiff-appellant's trust account at the institution where the plaintiff-appellant resides shall compute an initial partial payment, twenty percent (20%) of the greater of: (1) the average monthly deposits to the plaintiff-appellant's account, or (2) the average monthly balance in the plaintiff-appellant's account for the preceding six (6) months. After the plaintiff-appellant pays the initial partial filing fee, the plaintiff-appellant must make monthly payments of twenty percent (20%) of the preceding month's income credited to the plaintiff-appellant's account. 28 U.S.C. § 1915(b)(2).

It is further **ORDERED** that the custodian of the plaintiff-appellant's trust account is directed to: (1) withdraw or set aside the initial partial filing fee from the plaintiff-appellant's trust fund account, (2) forward this amount to the Clerk of this Court within thirty (30) days of the date of this order, and (3) in subsequent months, or from time to time, forward payments of twenty percent (20%) of the preceding month's income credited to the plaintiff-appellant's account to the Clerk of this Court until the plaintiff-appellant has paid the entire filing fee of \$455.00.

The Court will notify the agency having custody of the plaintiff-appellant when the plaintiff-appellant has paid the entire filing fee. The Court has attached to this order a copy of the plaintiff-appellant's authorization to withdraw funds from his trust fund account.

s/**David M. Lawson**
DAVID M. LAWSON
United States District Judge

Dated: May 17, 2010

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on May 17, 2010.

s/Teresa Scott-Feijoo
TERESA SCOTT-FEIJOO